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ADVOKAT UND NOTARMitglieder
der Advokatenkammer Basel und
des Schweiz. AnwaltsverbandesMr. W. Edward Bailey
c/o Fish & Neave
875 Third AvenueNew York, N.Y. 10022
USASeptember 16, 1985
Th/aaPhilip Morris (Patent Infringement Proceedings against B&W
in Switzerland)

Dear Mr. Bailey,

I refer to my letter of August 26, 1985, and I would now like
to give you myOpinionon the question of possible infringement of Philip Morris Inc.'s
Swiss patents no. 470'145 (Osmalov) and no. 633'421 (Filosa) by
the sale of B&W's Barclay cigarettes in Switzerland.I. Infringement of Swiss Patent no. 470'145 (Osmalov)

1. The characterizing elements of the patented mouth piece according to the Osmalov patent are

a) its arrangement in alignment with the tobacco section;

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- b) its containing a continuous inner channel which is connected for the purposes of flow with the tobacco section;
 - c) such inner channel forming a flow path for smoke drawn from the tobacco section;
 - d) the cigarette possesses a tobacco section composed of a tobacco cord and a wrapper;
 - e) the tip contains at least one ventilation channel;
 - f) the ventilation channel is arranged longitudinally;
 - g) the ventilation channel is separate from the inner channel;
 - h) the ventilation channel ends at an outlet at the end of the mouth piece which is farthest from the tobacco section;
 - i) the ventilation channel is at its inlet connected to the outer air;
 - j) when the cigarette is smoked, a simultaneous stream of air is drawn through the ventilation channel.
2. Comparing the Barclay cigarette to the characteristics outlined under 1. above, we come to the following conclusions:
- a) Element a) is clearly realized.
 - b) The Barclay cigarette's tip does not contain an inner channel in the sense of an empty space as shown in fig. 1, 1 a), 2, 3, 5 and 6 - 9 of the Osmalov patent. It could however be argued that the inner channel does not

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have to be empty, but could be filled by porous material such as a filter rod (as shown in fig. 4 of the Osmalov patent); this argument could be supported by the fact that the priority patent (U.S. no. 3'490'461) uses the expression "passage" rather than "channel".

- c) Element c) would be realized if the term "inner channel" were interpreted according to b) above.
- d) Element d) is not essential because the Osmalov patent covers only a cigarette tip and not the entire cigarette; however, the element describes the obvious structure of a cigarette which is also realized in the Barclay type.
- e) Element e) is realized: The Barclay cigarette contains four grooves.
- f) Element f) is also realized: The Barclay grooves are longitudinal.
- g) Element g) is realized if the term "inner channel" is interpreted according to b) above.
- h) Element h) is realized: The Barclay cigarette's grooves end at the end of the tip which is farthest from the tobacco section.
- i) Element i) is realized.
- j) Element j) is realized.

I come to the conclusion that the Barclay cigarette incorporates all characterizing elements of the Osmalov patent provided that the term "inner channel" is interpreted according to b) above.

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II. Infringement of Swiss Patent No. 633'421 (Filosa)

The numerous claims of the Filosa patent necessitate a choice as to which claim should be compared to the Barclay cigarette. For reasons which are self-evident, I am choosing claim 6.

1. The characterizing elements of the patented filter cigarette according to claim 6 of the Filosa patent are:
 - a) A rod of smoking material;
 - b) a filter attached to the rod;
 - c) the filter's cross section is smaller than the cross section of the rod;
 - d) the filter is situated in a mouth piece of essentially the same cross section as the rod;
 - e) the tip's outer wall contains at least one air inlet;
 - f) the tip contains at least one separate, longitudinal ventilation channel for conducting air from the inlet to the end of the tip.
2. Comparing the Filosa patent to the characteristics outlined under 1. above, we come to the following conclusions:
 - a) Element a) is realized.
 - b) Element b) is also clearly realized.
 - c) Element c) is realized because the grooves in the Barclay filter reduce that filter's cross section. It could however be argued that, in the Barclay cigarette, the filter's cross section is only marginally smaller than the

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cross section of the rod while the Filosa patent seems to stress the importance of a substantial difference (cf. claim 2).

d) Element d) is clearly realized.

e) Element e) is also realized.

f) Element f) is realized.

I come to the conclusion that the Barclay cigarette incorporates all characterizing elements of the invention protected by the Filosa patent unless element c) is interpreted in such a way as to require a substantial difference of the cross sections of filter and rod.

III. Recapitulation

As can be seen from I. and II. above, infringement by B&W of both the Osmalov and the Filosa patents may depend on the interpretation of one characterizing element each, namely the term "inner channel" in connection with the Osmalov and the cross section difference between filter and rod in connection with the Filosa patent. Because these questions are technical as well as legal, I suggest that they be submitted to a technical expert (preferably Philip Morris' Swiss patent attorney) before any decisions are made.

For good order's sake, let me say that I have not examined the validity of the Osmalov and the Filosa patents.

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I hope that this letter will prove useful, and I remain of course at your disposal for any additional information you may require.

Yours sincerely,



Dr. Felix H. Thomann

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